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IN THE

Supreme Court of the United States

No. 632

CHARLES LAWLOR and MITCHELL PANTZER, co-partners trading as INDEPENDENT POSTER EXCHANGE,

Petitioners,

vs.

NATIONAL SCREEN SERVICE CORPORATION,

Respondent

PETITION OF CHARLES LAWLOR AND MITCHELL PANTZER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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SUPREME COURT OF THE UNITED STATES

No.

Charles Lawlor and Mitchell Pantzer, co-partners trading as Independent Poster Exchange,

Petitioners

vs.

National Screen Service Corporation,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Charles Lawlor and Mitchell Pantzer, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on October 24, 1956.

OPINIONS BELOW

The opinion of the Court of Appeals has not been reported. A copy thereof is appended to this petition (See Appendix A, this petition, *infra*, p. 1A).

The opinion of the District Court, dated August 8, 1955 is unreported. A copy of it is contained in the "Appendix for Plaintiffs-Appellants"[1] at pages 29a-31a.

The opinion of the District Court dated July 25, 1951, which was followed in the above mentioned opinion of August 8, 1955, is reported in 99 F. Supp. 180. A copy of it is contained also in the "Appendix For Plaintiffs-Appellants" at pages 16a-28a.

A copy of the final decree entered by the District Court is contained in the "Appendix For Plaintiffs-Appellants" at pages 35a-36a.

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[1] Three volumes of printed appendices were filed in the court below, i.e., (1) "Appendix For Plaintiffs-Appellants", consisting of pages 1a to 229a; (2) "Supplemental Appendix For Plaintiffs-Appellants", consisting of pages 230a to 240a, and (3) "Appendix For National Screen Service Corporation", consisting of pages 1b to 31b. A certified copy of these appendices, and nine additional copies thereof, have been filed with this petition in accordance with Rule 21 of this Court. All references to the record in this petition, other than references to Appendix A, annexed hereto, are to these appendices.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered October 24, 1956. The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646(1), 62 Stat. 928(1), 28 U.S.C. §1254(1).

STATUTE INVOLVED

This case involves the Act of October 15, 1914, c. 323, §16, 38 Stat. 737, 15 U.S.C. §26 (generally known as the Clayton Act) the pertinent portion of which is quoted below.

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by the courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue:"

QUESTIONS PRESENTED

1. Whether the District Court was right in holding that the undisputed facts of this case disclose a continuing violation of the federal antitrust laws that should be restrained by entry of a final injunction on a motion for summary judgment.

2. Whether the Court of Appeals erred in striking down the injunction entered by the District Court.

3. Whether monopolization of the business of distributing motion picture advertising posters can be legally justified on the ground that such posters and other advertising media, such as "newspapers, magazines, radio, television, mail and handbills"[2] are all part of the same market.

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[2] Appendix A, this petition, *infra* p. 15A.

STATEMENT

Summary

This is an action for an injunction and treble damages under the federal antitrust laws.[3] The case has not yet been tried on the merits because plaintiffs, petitioners herein, contending that the admitted or undisputed facts call for entry of a final injunction as a matter of law, filed a motion for summary judgment with respect to the claim for injunctive relief. The District Court granted the motion and entered a final injunction. The Court of Appeals reversed, holding that the alleged illegality of respondent's conduct is questionable, and must, therefore, be passed on by a fact-finding tribunal.

Factual Background

Petitioners are engaged in the business of supplying motion picture exhibitors with advertising posters, called standard posters, or standard accessories. The posters are supplied on a rental basis, and therefore the distributors are sometimes called poster renters. Petitioners' business is confined to the Philadelphia area.

The respondent—National Screen Service Corporation—also is engaged in the poster distribution business, but on a national scale, and it therefore competes with petitioners in the Philadelphia area.

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[3] Act of July 2, 1890, c. 647, S. 1 and 2, 26 Stat. 209, 15 U.S.C. S. 1 and 2; [Sherman Act]; Act of October 15, 1914, c. 323, S. 4 to 16, 38 Stat. 731, 15 U.S.C. S. 15 and 26 [Clayton Act].

Statement

The production [4] of standard posters is now, and always has been, under the control of the film companies who produce the film that the posters advertise. All of these companies maintain film distribution centers, called exchanges, in about thirty of the larger cities (131a and 150a). Originally the film companies sent their posters to these exchanges, where they were sold to exhibitors (52a). The practice of charging a price for the posters made it possible for local service concerns to come into existence. These concerns acquired [5] quantities of the posters of all the major companies and offered to supply them to exhibitors on a rental basis. In addition to offering lower prices, the poster renters had the advantage of offering the exhibitor an opportunity to obtain all of his standard poster requirements from a single source instead of having to deal with eight [6] different exchanges. As a result of these advantages the poster renting businesses succeeded to such extent that for many years prior to 1940 there were enough poster renters in existence to form an association which was known as the National Posters Renters Association, and at least one poster renter was to be found in nearly all, if not all, of the established exchange centers (197a).

In 1940,[7] two of the major film companies, RKO and Paramount, by written agreements, conferred on respond-

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[4] The methods of production will be found detailed at 194a.

[5] The posters were sometimes acquired by direct purchase from the film companies, and they could have been acquired also from exhibitors who had bought them from the film companies (197a).

[6] There are eight major film companies in the United States, the short names of which are Paramount, RKO, Loew's, Universal, Columbia, United Artists, Warner and Fox (18a, n. 4).

[7] Prior to 1940 respondent was not in the standard poster renting business, but for some years prior thereto it had been engaged in the business of renting (1) a more elaborate and more costly kind

ent the exclusive right and power to procure and distribute standard posters in any part of the United States (60a, 71a).

By these agreements, of course, respondent gained the power immediately to cut off all competing poster renters from supplies of posters for RKO and Paramount films, and respondent promptly exercised this power. Indeed, both agreements expressly denied respondent the right to sublicense the right to distribute the posters (63a, 73a). Moreover, from all indications it appeared that respondent would soon obtain similar agreements with all the other major film companies (64a-65a; and see 232a-234a). It therefore seemed that the death knell had sounded for all the localized poster renters. At any rate, the fact is that within a few months after the RKO and Paramount agreements were announced, twenty-eight localized poster renters sold out their businesses to respondent (190a; 235a, 236a).

For some reason,[8] however, the next (or third) exclusive agreement (that with Loew's) was not made until February, 1942 (42a).

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of poster known as a specialty poster, and (2) film trailers. In 1940 it had contracts with four film companies giving it the exclusive right to possess and rent specialty posters (40a-41a; and see 90a-97a), and contracts with six film companies giving it the exclusive right to possess and rent film trailers (40a-41a; and see 103a-109a), all on a national scale. To conduct this business, it operated eight exchanges. When it entered the field of handling standard posters it opened more than twenty additional exchanges (145a).

[8] The reason may have been that respondent needed time to build up an organization sufficient to cover the entire United States exclusively: See 145a.

Statement

In the meantime, respondent had been getting some competition from the few localized poster renters who elected to remain in business. These local concerns, of course, had to obtain their supplies of RKO and Paramount posters from sources located outside of the United States. With respect to the posters produced by the other six major film companies, respondent and all others obtained their supplies in the same manner, that is, by purchase from the respective film companies (168a-169a).

The news of the Loew's contract resulted in the banding together of twelve local poster renters in the bringing of an antitrust action, in April, 1942, in the District Court for the Eastern District of Pennsylvania, Civil Action 2472 (155a).

The petitioners herein were among the plaintiffs in the 1942 action. The defendants were respondent and the three contracting film companies, RKO, Paramount and Loew's (155a).

The Complaint filed in the 1942 action alleged that respondent's plan was completely to monopolize the standard poster renting business, and it was specifically alleged that negotiations for additional exclusive agreements had been opened with Universal, Columbia, Fox and Warner (157a).

In April, 1943, the 1942 action was settled and ended by respondent's agreeing to sell plaintiffs supplies of the standard posters it controlled, and to grant the plaintiffs sublicenses to rent those posters, in competition with it. These sublicense agreements recited, in effect, that it was respondent's plan to obtain exclusive standard poster distribution contracts with the other five major film com-

panies, and provided that respondent would sell the plaintiffs supplies of standard posters of all companies which should enter into future exclusive contracts with it (110a to 129a).[9]

During the four-year period following the settlement of the 1942 action, all of the five remaining major film companies did sign contracts granting respondent the same exclusive poster rights as those granted by RKO, Paramount and Loew's. The Universal contract was signed in 1944 (82a), the Columbia contract in 1945 (84a), the United Artists and Warner contracts in 1946 (86a, 88a), and the Fox contract in 1947 (89a).[10]

The consideration for the grant of these exclusive licenses was respondent's commitment to share the profits, which resulted in the film companies' making a substantial profit out of what would ordinarily be an advertising expense (184a). As stated in the affidavit filed on behalf of RKO (223a):

> "The contract provided for a minimum guaranteed payment by National Screen to RKO against a percentage of the gross, thus automatically turning a loss into a profit."

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[9] The sublicenses made no provision for making available any supplies of specialty posters and therefore petitioners, and others in like position are unable to deal in such posters.

[10] Likewise between 1940 and 1947 respondent rounded out its monopolization of distribution of specialty posters by obtaining four more exclusive license agreements (98a-103a). With respect to film trailers, the six-out-of-eight status remained unchanged.

History of the Case

The instant action was commenced on August 18, 1949.[11] In their complaint petitioners averred that the defendants—i.e., the respondent herein and the eight major film companies—had conspired to monopolize, and had monopolized, the poster distribution business, and petitioners prayed for injunctive relief and treble damages.

On October 20, 1950, petitioners, together with the plaintiffs in three similar actions, filed motions in the District Court for summary judgment for injunctive relief on the theory that the system of poster distribution set up by the exclusive license agreements constituted a violation of the federal antitrust acts as a matter of law. These motions came on for argument before District Court Judge J. P. McGranery, since resigned.

On July 25, 1951, Judge McGranery handed down an opinion holding that petitioners were entitled to injunctive relief against respondent because the admitted facts sustained petitioners' claim of unlawful monopoly[12] (16a).

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[11] When the action was commenced, all of the exclusive license agreements with the film companies were actually in effect. In the meantime, all agreements have expired, but it is in effect admitted that the system of poster distribution established by the agreements is still in operation (see Appendix A, this petition; p. 5A). Similarly, the sublicense agreements have expired, but up to this time respondent has not discontinued selling supplies to petitioner and other competitors (Id. p. 6A).

[12] With respect to the film company defendants, the District Court held that conflicting evidence on the issue of conspiracy made a trial necessary (25a-27a).

Before a decree was entered, however, all the defendants filed belated motions to dismiss the action on the ground that the consent judgment of dismissal of the 1942 action was res judicata; and on November 6, 1953, the District Court (Chief Judge Kirkpatrick sitting) granted the motions to dismiss and entered a formal order dismissing the action.

On March 30, 1954, the order of dismissal was affirmed by the Court of Appeals for the Third Circuit.[13]

In due course, petitioners petitioned this Court for issuance of a writ of certiorari to the Court of Appeals. This petition was granted, and on June 6, 1955, this Court rendered a decision reversing the Court of Appeals, and reinstating the case in the District Court for further proceedings.[14]

Promptly after the reinstatement of their case in the District Court, to wit, on July 2, 1955, petitioners renewed their motion for summary judgment for injunctive relief against respondent. At or about the same time similar motions were filed in a number of companion cases. Argument on these motions was heard by District Judge Kirkpatrick, and on August 8, 1955, he filed an opinion (29a) holding, in effect, that an injunction should be entered against respondent in accordance with the opinion delivered by District Judge McGranery on July 25, 1951 (16a). On December 21, 1955, the District Court entered a formal order (8a) granting petitioners' motion for summary judgment against respondent, and on the same day a final decree was entered of record (9a). This decree was

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[13] *Lawlor v. National Screen Service Corp.*, 211 F. 2d 934.

[14] *Lawlor v. National Screen Service Corp.*, 349 U.S. 322.

the same as a decree entered in a companion case on December 15, 1955, which decree is printed at 35a.

On December 22, 1955, respondent appealed to the Court of Appeals for the Third Circuit from the entry of the final decree in this case and in six companion cases.

On December 27, 1955, petitioners, and others, also appealed on the ground that the provisions of the decree were inadequate. These appeals, however, were withdrawn before argument.

Respondent's appeals were argued before the Court of Appeals on June 8, 1956, and on October 24, 1956, the Court of Appeals, in an opinion filed, reversed the District Court and struck down the final decrees, holding in effect, that the system established by respondent's exclusive licenses is not necessarily in conflict with the antitrust laws (Appendix A, this petition *infra*, p. 1A).

ARGUMENT

The opinion of the Court of Appeals is not too clear cut, but the gist of it is that respondent's "dominant position" with respect to distribution of standard posters can be legally justified on the ground that there is no separate and distinct market for such posters, but that they, and other advertising media, such as "newspapers, magazines, radio, television, mail and handbills",[15] taken all together, constitute one and the same market, with the result that the competition from those other media prevents respondent from possessing monopoly power with respect to distribution of posters. The court summed up its position as follows (Appendix A, this petition, *infra* p. 16A):

> "Whether the standard accessories produced and distributed by National are in the same 'area of effective competition' as other media of movie advertising, and whether there are equally effective substitutes for the accessories produced and distributed by National are factual issues, not capable of resolution on pleadings and affidavits. Such issues require determination by the trier of facts only after trial."

The court's conclusion was based on its construction of the opinion recently rendered by this Court in *United States v. duPont & Co.*, 351 U.S. 377. This would seem to be manifest error, grossly distorting the decision of this

[15] Appendix A, this petition, *infra* p. 15A.

Court, and gravely undermining the basic structure of the Sherman Act.

In the *duPont* case this Court held that a certain kind of flexible wrapping material, cellophane, is so similar to other available kinds of wrapping material that it was not a violation of the Sherman Act for duPont to have acquired control of the business of producing it; and, on the basis of that ruling, the court below, reversing the district court, held that it was not necessarily illegal for respondent to have acquired control of the business of distributing advertising posters because of the supposed similarity, or substitutionary nature, of other media of advertising, such as "newspapers, magazines, radio, television, mail and hand bills".

But there is no basis for the conclusion that there is any such degree of similarity between these advertising media as the Court in the *duPont* case found to exist between the different kinds of wrapping materials. Indeed, it seems plain that in writing the opinion of the Court in the *duPont* case Mr. Justice Reed was careful to guard against seeming to give the impression that the Court intended to encourage any indiscriminate inclusion of a number of products in the same market on the basis of mere general commodity competition. Thus, the opinion of this Court states that (351 U.S. at 393):

> ". . . one can think of building materials as in commodity competition but one can hardly say that brick competed with steel or wood or cement or stone in the meaning of Sherman Act litigation; the products are too different."

Common sense demonstrates that there is even less difference between the various kinds of building materials

than there is between posters and other possible means of advertising. Indeed, it is obvious that whereas posters are used only for advertising, such things as newspapers, radio and television are used primarily for other purposes, and only incidentally for advertising. This alone is sufficient to prove that posters cannot rationally be thought of as substitutes for newspapers, radio or television, or *vice versa.*

It is therefore submitted that reason alone proves that the court below has fundamentally misconstrued and misapplied the ruling made by this Court in *United States v. duPont & Co., supra.*

But it is unnecessary to rely on reason alone; because the record in this case is replete with specific proof that in the motion picture industry advertising by posters displayed at the theatres, as distinguished from, and in addition to, other advertising processes, is regarded as virtually indispensable. For example, the Loew's-respondent exclusive license agreement covering standard accessories —(i.e., standard posters) provided as follows (51a):

> "NATIONAL SCREEN understands and agrees that one of the principal reasons that Loew's is entering into this agreement is to assure Loew's the widest possible use in the territory [of the United States] of its standard accessories, Loew's believing that such is of paramount importance in increasing the popularity of its motion pictures and the attendance of the public thereto."

Most of the other license agreements contain substantially the same provision: See 83a, 87a, 88a, 89a.

The importance of the use of standard posters is further demonstrated by the fact that respondent went to

great trouble and expense in order to monopolize the business of distributing them. As previously stated, respondent opened more than twenty exchanges when it entered the business of distributing standard posters, and with respect to the expense of this venture, respondent's affidavit states that (145a-146a):

> ". . . Exhibitors had been trained to go to exchanges for accessories. Since National Screen in 1940 had only eight such exchange centers, a serious problem arose over the expansion which would be necessary before National Screen could fulfill the requirement of national distribution facilities thought necessary by Paramount. National Screen finally undertook to increase its branch office by adding more than 20 new offices in widely separated cities throughout the United States. This required a large expenditure on its part for equipment, leaseholds and personnel.
>
> National Screen's leasehold obligations for the new branches had to be undertaken for an approximate period of five years. In one city, it later developed, National Screen could not obtain appropriate premises without binding itself to a ten-year lease. In view of the large expenditures undertaken by National Screen, its long term investment and risk, it wished to be assured of at least a five-year exclusive term, so that it would have some opportunity to amortize its investment and diminish its risks. Natural and reasonable economic reasons properly affecting both licensor and licensee prompted the exclusive five-year clause. This clause could not have had any relationship to competitive conditions because we know of no other

company, and I believe there was none, which was either ready, able or willing to undertake these highly specialized services, make the large investments required (involving millions of dollars), or take the great risk incident thereto. Nor, to my knowledge, has there been any since."

Indeed, respondent does not seek to defend itself on the ground upon which the court below, defends it. That is to say, respondent's defense is that there actually is competition in dealing in standard accessories, not that such competition is unnecessary. Thus, in its affidavit respondent declares that (146a-47a):

"In the case of standard accessories, there is unlimited competition, including even the copyrightable material. National Screen though it was under no legal obligation to do so, has offered to all poster-renters the right to acquire at wholesale rates its copyrighted standard accessories for lease to exhibitors. The plaintiffs have availed themselves of these rights and entered into contracts with National Screen for a five-year term. Under these contracts, plaintiffs have ordered and received the identical accessories which National Screen has conceived[16] and created for its own use. . . . They, including the very plaintiffs in this action, have conducted their business, licensing every type of standard accessory, including the copyrighted accessories to exhibitors. They have operated from their own 'exchanges', situated nearby National Screen's 'exchanges', and in direct competition with National Screen for the same customers.

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[16] The contracts plainly show that respondent procures the reproduction of, and distributes, standard accessories conceived and created by the film companies: See 42a, 42a-48a.

"Plaintiffs and other poster-renters enjoying licenses from National Screen simply order what they wish. We supply their demands. . . . Thus, in many ways plaintiffs and other poster-renters actually have competitive advantages over National Screen. Not only is there untrammeled competition for standard accessories, including even the copyrighted ones, but plaintiffs compete with National Screen on better than equal terms."

That is indeed a far cry from saying that direct competition in the business of dealing in standard accessories is not necessary because of the availability of substitutes. The District Court adequately summed up the matter as follows (25a):

"Whether competition between posters exists or not, competition between poster-renters does exist, however restricted in nature. And the acquisition by National Screen of exclusive license agreements for the distribution of standard accessories of the 'big eight' forecloses competition from a substantial market, a course of conduct unreasonable per se. International Salt Co. v. United States, (332 U.S. 392, 396)."

The court below pitched its decision on the additional ground that: ". . . standard accessories . . . are not essential to the exhibitor since equally effective articles are available to the exhibitor from other sources, such as sign-painters, printers, and other poster renters'"[17] (Appendix A, this petition *infra*, p. 15a).

In the first place, it should be self-evident that the special, or custom-made, posters produced by sign shops

[17] This linking of "other poster renters" to sign-painters and printers is meaningless from any possible point of view.

and printers would be vastly more expensive than the "*standard*" posters produced in mass. It hardly needs to be demonstrated that any standard article is much less expensive, and therefore much more readily available than the custom-made article. The record, however, is full of such demonstration. Reference had been made to the fact that it is the aim of the film companies to have their standard posters used in all the theatres in the United States. In that territory there are about 20,000 theatres (130a-131a); and any particular picture may be booked in as many as 18,000 theatres (131a); from which it is obvious that the number of each of the standard posters produced for each picture must be very large.

Moreover, the record shows that respondent itself is a producer of specialty posters in large numbers, and that even these mass-produced specialties are much less commonly used than the standard variety. The record shows that Warner never considered specialty posters important enough to produce them (194a), and Loew's affidavit states that (208a):

> "Prior to July, 1937 Loew's Incorporated manufactured and sold or leased to exhibitors the specialty accessories and the standard accessories and the trailers which were used by exhibitors to advertise their forthcoming exhibitions of the feature motion pictures distributed by Loew's Incorporated. However, Loew's Incorporated only prepared, manufactured and distributed specialty accessories for a few of its feature motion pictures and that form of advertising was not considered of very great importance."

In the affidavit filed on behalf of Fox it is stated that (133a):

> "Accessories in these cases have been classified as 'standard' and as 'specialties'. By 'standard accessories' are meant lithographs, poster sheets and stills related to a particular picture usually displayed in the theatre. By 'specialties' are usually meant the out-of-the ordinary advertising equipment that is specially made for a particular picture—elaborate banners, special pictorial theatre fronts, large title cards and the like."

In the opinion of the court below it is conceded that the speciality posters are ". . . more elaborate and more costly than the standard posters . . ." (Appendix A, this petition, *infra* p. 3A).

Moreover, the record[18] shows that respondent has as complete a monopoly of the production and distribution of specialty posters as it does of standard posters, and respondent's affidavit specifically states that to the extent that custom-made specialties are used they are "in competition with the special accessories of National Screen" and not the standard accessories.

The court below concluded (Appendix A, this petition, *infra* pp. 18A-19A):

> "Trial of the disputed factual issues is required to arrive at the ultimate fact-finding as to whether the exclusive agreements between National and the producer-distributor defendants formed part of a deliberately acquired monopoly, or whether they were part of the natural business growth of National, reasonably necessary to protect the lawful business inter-

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[18] See *supra*, this petition, p. 7, n. 7 and p. 10, n. 10; and see the opinion of the court below, Appendix A, this petition, *infra* at pages 3A, and 5A.

ests of National and the producer-distributor defendants."

But the plain fact is that what happened was that respondent bought from the producer-distributor defendants the right and power completely to take over a pre-existing business, and to exterminate all those found in it, anywhere in the United States, with the result that many sold out to respondent, and those who have remained in the business have had to look to their giant competitor to provide them with their stock in trade.

To say that such conduct can be considered as "natural business growth . . . reasonably necessary to protect . . . lawful business interest" is to betray not merely indifference but actual hostility to the antitrust laws. As was said in the opinion of the District Court (23a-24a):

> "And by no stretch of the imagination can it be said that monopoly has been 'thrust' upon National Screen unwittingly, or that it has passively achieved its position of pre-eminence. United States v. Aluminum Co. of America, ((2 Cir.) 148 F. 2d 416). The story of its growth is the story of active planning deliberately undertaken and leading inevitably to monopoly. It is entirely irrelevant that there may have been no resort to unfair competitive practices. National Screen has monopolized the field of distributing standard accessories in violation of the law."

It is submitted that public confidence in the antitrust laws would be greatly strengthened by this Court's issuance of a writ of certiorari in this case.

It is true that the judgment of the court below is not final, but it is well settled that such judgments may be reviewed by this Court when they involve questions which are "fundamental to the further conduct of the case":

United States v. General Motors Corp., 323 U.S. 373, 377; *Lana v. Dollar*, 350 U. S. 731, 734, n. 2. In this instance, it is manifest that the judgment below, if not reviewed and reversed by this Court, will affect further conduct of the case fundamentally, because at the trial of the damage phase of the case the jury will have to be instructed that it has the power to say that within the purview of the antitrust laws the business of dealing in advertising posters cannot be regarded as being subject to monopolization because advertising posters and "newspapers, magazines, radio, television, mail and handbills" are, in contemplation of law, interchangeable substitutes for each other. In other words, the jury will be given absolute and arbitrary power to draw legal conclusions which should be drawn only by the court, and this must result in reversible error and utter confusion. It is submitted that the error committed by the court below is so fundamental that it should be corrected with all possible speed, but certainly before this case goes to trial to a jury on the question of damages.

Moreover, this is a case that for the first time deals with the fundamentally important question of the right of a private plaintiff in an antitrust action to take advantage of undisputed facts by obtaining a final injunction by way of summary judgment procedure. In *International Salt Co. v. United States*, 332 U.S. 392, this Court affirmed the right of the United States to obtain a final injunction summarily, but this is the first case involving the rights of a private plaintiff in that regard. If the decision below remains in effect it will be all but impossible for the private plaintiff to obtain such relief. In other words, section 16 of the Clayton Act will be practically nullified insofar as the obtaining of final injunctions by way of summary judg-

ment is concerned. And this becomes all the more important when it is remembered that it is only by summary judgment procedure that a private antitrust plaintiff can obtain a final[19] injunction until after the trial at law of the damage phase of the case (unless trial to a jury has been waived); because it is well established that the defendant in an antitrust action would be unlawfully deprived of his right to a jury trial on the issue of damages if the plaintiff were permitted to proceed first to try the suit in equity for injunctive relief without waiving the right to damages: *Fleitmann v. Welsback Co.*, 240 U.S. 27; *Decorative Stone Co. v. Building Trade Counsel*, 23 F. 2d 426, cert. den. 277 U. S. 594. In this case demand has been made for a jury trial on the issue of damages, and therefore, if the decision of the court below remains in effect, plaintiff will have to discontinue efforts to obtain an injunction until after the completion of a jury trial which will be governed by the conclusions of the court below.

In this connection, it should be noted that on its facts this is a most appropriate case for disposition by summary judgment procedure. Petitioners rely entirely on documentary evidence, furnished by respondent itself, i.e., the exclusive license agreements and the sub-license agreements. The one and only question is whether the system set up by those agreements is legal or illegal. The rules of procedure provide ample opportunity for respondent to place on the record any evidence it has to escape the conclusion of illegality. Actually, respondent has filed three affidavits. In the printed appendices filed in the court below, petitioners reproduced portions of those affidavits

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[19] Manifestly, a preliminary injunction could not be used to eradicate a long-established national monopoly.

covering six printed pages (143a-148a), and respondent, in its separate appendix, reproduced twenty-four printed pages (1b-24b). There is no reason to believe that respondent has left anything unsaid that might be of any help to it. Consequently, there is no reason for going to trial on the issue of injunctive relief. The evidence is all before the court, and the issue should be decided now. And this is especially so in view of the fact that the monopoly complained of has been in operation for sixteen years, and this very case has been pending for over seven years. In the opinion below the court took occasion to say that: "It was not until mid-year, 1955 that the plaintiffs moved for summary judgment before Chief Judge Kirkpatrick . . ."[20] But the court saw fit not to mention the fact that much time was lost as a result of the error committed by that court in affirming the judgment of the District Court dismissing this action absolutely on the ground of res judicata. The fact is that petitioners renewed their motions for summary judgment promptly after the case was reinstated in the District Court by the order of this Court.[21] The court below likewise failed to mention the fact that the record shows that on September 14, 1955, the Chief Judge of the District Court stated that ". . . it has been unconscionable the way [this case] has been dragged out [by respondent] and I really think I deferred a great deal more than I should to Mr. Nizer's various engagements in other courts" ("Supplemental Appendix for Plaintiff-Appellants" at 238a). It is submitted that petitioners have not caused delay, but have been the victims of delay to an unprecedented degree, not only to their own detriment, but

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[20] Appendix A, this petition, *infra*, pp. 7A-8A.

[21] *Lawlor v. National Screen Service Corp.*, 349 U.S. 322.

to the detriment of the public, and to respect for the administration of justice in the courts of the United States. As has been shown, this case involves more than the mere private rights of the petitioners. The case is literally national in scope, and directly affects the rights of every person engaged in the business of motion picture poster distribution within the United States. The record shows that all decisions of the courts in this case are given prominent publicity in the trade papers (see "Supplemental Appendix for Plaintiffs-Apppellees"). It is submitted that this Court should not suffer a case so far-reaching as this to be sidetracked and submerged as a result of exhausting delay occasioned by "unconscionable" conduct of respondent, and erroneous decisions rendered by courts below. The court below took occasion to note that ". . . National [Screen] offered to put the plaintiffs '. . . in exactly the same position as National Screen is today in every particular', but the offer was rejected" (8A, infra). But National Screen's affidavit states that in attaining its present position it was necessary for it to invest "millions of dollars" (146a). And there is nothing on this record to show that petitioners could make such investments even if they had any desire to emulate National Screen, which they do not. The burden of keeping this litigation alive is about all that petitioners are able to carry.

There remains to mention the fact that in the opinion of the court below reference is made to the fact that in their complaint petitioners charge respondent with commission of various specific acts of unfair competitive practices, and in support of its denial of injunctive relief the court points out that respondent denies these charges.[22] But it

[22] Appendix A, this petition, *infra*, p. 18A.

was made plain to the court that petitioners do not rely on establishment of any of these charges insofar as their prayer for injunctive relief is concerned.[23] In that connection, petitioners rely on the rule of law that they are entitled to injunctive relief against *threatened* injury to their business, regardless of the fact that no actual injury has been suffered. It is literally true that respondent has absolute power at any time, and without a moment's notice, to cut off petitioners' supplies of vital materials, and thus put them out of business; and it is to gain relief from that threat that injunctive relief is sought. For the purposes of this proceeding, petitioners are willing to assume, without admitting, that respondent has proved to be the most benevolent monopolist imaginable. As the District Court said (25a):

> "The plaintiffs, therefore, face the threat of the irreparable injury of exclusion from competition by National Screen's monopoly, and they are entitled to injunctive relief against the monopoly under Section 16 of the Clayton Act."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,
FRANCIS T. ANDERSON,
Counsel for Petitioners.

[23] See Appendix A, this petition, *infra*, p. 10A, n. 9.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,818

CHARLES LAWLOR, ET AL.

Appellants

v.

NATIONAL SCREEN SERVICE CORPORATION

OPINION OF THE COURT

(Filed October 24, 1956)

By KALODNER, *Circuit Judge*

Was there, in the cases involved in these appeals, a genuine issue as to a material fact which, under well-settled principles, precluded the entry of summary judgments adjudicating the defendant-appellant, National Screen Service Corporation ("National") to be an unlawful monopoly?

That is the critical issue presented by these appeals from decrees of the District Court for the Eastern District of Pennsylvania granting sweeping injunctive relief against

National pursuant to the entries of summary judgments against it.[1]

It may be stated preliminarily that involved are private anti-trust suits for treble damages and injunctive relief premised on alleged violation of the Sherman Anti-Trust Act.[2] All the plaintiffs and National are in the business of servicing motion picture theatres ("exhibitors") with advertising matter generally referred to as "standard accessories" which consist principally of lithographed posters, photographs of scenes from motion pictures described as "stills", and other articles designed for display in and about theatre lobbies in order to promote attendance at current or future exhibition of a particular picture.

Originally each motion picture producer created and prepared its own standard accessories for each of its feature motion pictures for distribution through its own exchanges, throughout the country, where they were leased to exhibitors. Local service concerns were later formed to acquire quantities of the posters of all the major companies which were supplied to exhibitors on a rental basis. The poster-renters were able to offer the exhibitor an opportunity to obtain all of his poster requirements from a

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[1] The plaintiffs have withdrawn their appeals, Nos. 11,818 to 11,824 inclusive and accordingly they will be dismissed. These appeals were based on alleged inadequacy of the injunctive relief granted plaintiffs by the District Court.

[2] Sections 1 and 2 of the Sherman Anti-Trust Act, 26 Stat. 209; 50 Stat. 693, 15 U.S.C.A. Sections 1 and 2; Sections 4 and 16 of the Clayton Anti-Trust Act, 38 Stat. 731, 737, 15 U.S.C.A. Sections 15 and 26.

single source instead of having to deal with eight different companies.[3]

National was incorporated sometime in the early 1920's. Originally its business was limited to servicing exhibitors with supplies of trailers or "prevues" which are short advertising films shown on the theatre screen. In the 1930's it also began distributing a special kind of poster, more elaborate and more costly than the standard posters, known as specialty accessories. By 1940 National had contracts with six of the eight major film companies giving it the exclusive right to distribute trailers throughout the nation, and contracts with four of the eight majors giving it the exclusive right to distribute specialty accessories in the same territory. In order to carry on its trailer and specialty accessory business, National maintained eight branch offices, or exchanges.

At the end of 1939 and early in 1940, Paramount Pictures, Inc. and RKO Radio Pictures, Inc. entered into separate agreements with National, each granting to National an exclusive license to manufacture and distribute standard accessories on a nation-wide scale. Both contracts were effective February 1, 1940, for five-year terms.

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[3] Of the eight major motion picture companies of the United States all engage both in production and distribution of motion picture films except defendant United Artists Corporation which deals only in distribution. Defendants Twentieth Century Fox Film Corporation, Columbia Pictures Corporation, Loew's Incorporated and RKO Radio Pictures, Inc. are all corporations engaging in both production and distribution of motion pictures. The remaining three producer-distributor-defendants, Paramount Film Distributing Corporation, Warner Bros. Pictures Distributing Corporation, and Universal Film Exchanges, Inc., are wholly-owned distributing subsidiaries of the parent producing companies.

A third exclusive contract was obtained by National from Loew's Incorporated on February 6, 1942.

In April, 1942, twelve poster-renters[4] instituted an action under the anti-trust laws against National and the three contracting film companies.[5] In April, 1943, the litigation was settled by an agreement whereby the then plaintiffs consented to a dismissal of their respective causes of action with prejudice, and National granted to each of them a sub-license wherein National agreed to supply the then plaintiffs with all of their respective requirements of standard accessories which National was then manufacturing under exclusive agreements and might subsequently manufacture under future exclusive licenses with other producers. The sub-license agreements were for a term of three years from May 1, 1943. They were renewed in 1946 for a five-year term to April 30, 1951. Similar agreements were effected with poster-renters who had not been parties to the 1942 litigation.

During the four-year period following the 1942 settlement, the five remaining major motion picture producers

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[4] That suit was captioned "Allied Poster and Supply Corp. et al. v. National Screen Service Corp. et al., Civil Action No. 2472. Lawlor, Lipp and Siegel, three of the plaintiffs in these actions, were among the plaintiffs in the Allied suit.

[5] The complaint charged that National intended to monopolize the motion picture advertising accessory business, and that National had also conspired with the other producers, and more specifically that the then existing exclusive agreements violated the Sherman Act and that they, together with the remaining producers, would effectuate and constitute an illegal monopoly. The primary relief requested was (1) an injunction to restrain the continuance of the then existing exclusive agreements and the consummation of the contemplated exclusive agreements, and (2) damages.

granted National exclusive right over their copyrighted standard accessories similar to the agreements with the other three majors. National also was given exclusive specialty accessory privileges between 1942 and 1946 by the four companies with whom no such contracts had previously existed.

All of National's *exclusive* standard accessory contracts with the major producers, excepting only RKO and Loew's Incorporated, expired December 31, 1949. The RKO contract expired a month later, January 31, 1950 and the Loew contract some two years later, February 28, 1952.

Four of the major producers, RKO, Columbia Pictures Corporation, Twentieth Century Fox Film Corporation and Universal Pictures Company entered into new agreements with National early in 1950. These contracts were in terms *non-exclusive* in that licenses to produce and distribute standard accessories would be granted to anyone who undertook to deal on a nation-wide basis in standard accessories, specialty accessories and trailers. On February 16, 1950, the relationship between National and Warner Bros. Distributing Corporation was extended for an indefinite period pending negotiations. This was done by letter agreement which did not cover the detailed questions dealt with in the former contract and said nothing about exclusivity. Apparently none of the other companies entered into any written agreement with National after 1949. The Fox, RKO, Columbia and Universal contracts expired at the end of 1954. However, it appears that the standard accessories of all the producer-distributor-defendants continued to be produced substantially in conformity with the expired agreements.

All the sub-licenses which National had granted to plaintiffs, or renewals thereof, expired in March or April, 1951. National, however, continued (and still continues) to make supplies available to plaintiffs.

Coming now to the tangled skein of litigation which preceeded the granting of the summary judgments and entries of decrees here involved:

The history of this litigation began on August 18, 1949, when the Lawlor action against National and the so-called "big-eight" producer-distributor motion picture companies was instituted. It was followed in quick succession by the Lipp, Siegel and Schrader suits. In October, 1950 all four plaintiffs moved for summary judgment. The motions were argued and considered as a unit by District Judge McGranery. On July 25, 1951, Judge McGranery filed an opinion, reported at 99 F. Supp. 180 (E.D. Pa. 1951) granting summary judgment for the injunctive relief requested by the plaintiffs against National but denying summary judgment against the producer-distributor-defendants on the ground that (p. 187) "The affidavits submitted by the defendants clearly indicate that each producer-distributor entered into its agreement with National Screen independently for legitimate business reasons related to its own enterprise . . .", and "a disputed question of fact appears, precluding summary judgment."

Judge McGranery's opinion makes it clear that it was premised on his view that National's exclusive contracts with the producer-distributors were, per se, as a matter of law, an illegal monopoly under the Sherman Anti-Trust Act.

That is demonstrated by these quotations from his opinion:

At page 185: "By virtue of its exclusive contracts with the eight other defendants (or their affiliates), National Screen has the power to remove plaintiffs from competition . . . No specific intent to monopolize is necessary; the only relevent intent is the intent to enter into the business arrangements which give rise to the power. By *entering into exclusive agreements* with the eight producer-distributor defendants (or their affiliates), *National Screen has acquired the power to exclude competition and demonstrated its intent to exercise that power. Hence, it would appear that National Screen is in violation of Section 2 of the Sherman Act.*" (emphasis supplied)

Again, at page 187: ". . . *the acquisition by National Screen of exclusive license agreements for* the distribution of standard accessories of the 'big eight' *forecloses competition from a substantial market, a course of conduct unreasonable per se.*" (emphasis supplied)

It is relevant to observe that Judge McGranery was of the view (p. 186) "It is entirely irrelevant that there may have been no resort to unfair competitive practices" and that as earlier stated he had found no evidence of any conspiracy between National Screen and the producer-distributors in the negotiation of the exclusive contracts.

For reasons not here pertinent the plaintiffs failed to submit to Judge McGranery a decree of injunction against National although he suggested in his opinion that they do so.[6] It was not until mid-year, 1955 that the plaintiffs

[6] On November 20, 1951 the plaintiffs Riff, Mitchel and Vogelstein moved for summary judgment on the injunction phase of the actions which they had instituted, but after a hearing held before Chief Judge Kirkpatrick on June 10, 1952, withdrew their motions.

moved for summary judgment before Chief Judge Kirkpatrick, Judge McGranery having resigned in the meantime.

Chief Judge Kirkpatrick in an unreported opinion filed August 8, 1955 granting summary judgment for injunctive relief against National Screen stated that "Not being persuaded that Judge McGranery's opinion was erroneous I shall follow it." On December 15, 1955, pursuant to the opinion noted, there issued the decrees under review.

It must be observed that in his opinion Chief Judge Kirkpatrick noted that the exclusive contracts on which Judge McGranery had premised his disposition had long expired and that National Screen had ". . . produced affidavits which have not been contradicted showing that, since the decision in the Lawlor case, it has either eliminated or offered to eliminate all the features of its agreements with the producer-distributors which the Court found objectionable, especially the exclusive character of the licenses granted." As to the latter Chief Judge Kirkpatrick said:

> "I am not called upon to decide whether, if these actions had been commenced after these changes in the contracts were made, the plaintiffs would be entitled to a judgment against National Screen. *I am dealing with the situation existing when these actions were commenced . . .*" (emphasis supplied)

Further, it may be noted parenthetically that at the hearing on the settlement of the decrees (September 14, 1955) National offered to put the plaintiffs ". . . in exactly the same position as National Screen is today in every particular", but the offer was rejected.

Again, it may be noted that at this same hearing plaintiffs' counsel admitted that the exclusive contracts did not, as a matter of law, per se constitute a violation of the Sherman Anti-Trust Act, going so far as to state "Exclusivity has nothing to do with it."[7] And at the time of oral argument plaintiffs' counsel conceded that exclusive agreements are not illegal per se.

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[7] Following are excerpts from the Notes of Testimony of the September 14, 1955 hearing on settlement of the decrees before Chief Judge Kirkpatrick:

P. 62 "Mr. Anderson: Now, that whole clause [as to exclusivity] Your Honor—and I don't want to exaggerate it—I should say it is nothing more than a flourish. It has no real significance in the case at all. . ."

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P. 63: "The exclusion provision has no bearing at all on the workings of this team, [National and the film companies] which is to sew up the source of supply of posters, which is absolutely independent of . . ."

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P. 78: "The Court: First of all, tell us what you have to say about what Mr. Beck pointed out as an apparent inconsistency, an inconsistent stress on exclusivity at the time of the McGranery hearings.

"Mr. Anderson: I have no doubt it is true. I have learned a lot since then, Judge. They tell me Abe Lincoln argued one thing one morning and another in the afternoon. It seems to me that that is just an attack on Anderson. Even now I don't think I am as good as they are.

"The Court: Well, you seemed anxious to answer it.

"Mr. Anderson: I just wanted to say that. Why drag in questions that aren't pertinent? It isn't a question of whether what I said in 1951 was correct or not or whether it was stupid or anything like that. The question is whether what I am saying now is right"

Original emphasis on the exclusive nature of the agreements between National and the producer-distributor-defendants has been shifted by plaintiffs to a theory which appears to declare that while all exclusive agreements are not illegal per se, these particular exclusive agreements are illegal per se and any arrangement, even absent the written agreements, which gives National exclusive rights of manufacture and distribution is violative of the anti-trust laws. Plaintiffs have not met, head-on, National's contentions contenting themselves with characterizing them as "plain drivel".[8]

The highlights of National's contentions may be stated as follows: (1) Judge McGranery erred in ruling that the exclusive agreements were a per se violation of the anti-trust laws and Chief Judge Kirkpatrick erred in following that ruling and using it as the premise for the dispostion of these cases. On this score National points to the fact, as stated above, that plaintiffs no longer view the anti-trust laws as a flat prohibition against all exclusive agreements; (2) this being so, the judgments should be reversed since there was a dispute as to numerous material issues of fact (subsequently stated) which under the law precluded entry of summary judgment; (3) and, further, permanent injunctions may not be granted as a matter of law without proof of threatened injury to plaintiffs' business,[9] by

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[8] The opening sentence of the brief for plaintiffs-appellees is as follows: "The greater part of National Screen's fifty-page brief is plain drivel, so it seems, not worth the recognition of a reply."

[9] At the oral argument plaintiffs admitted that "it is substantially correct" that they are not "being damaged in any way" as far as National's conduct at the present time is concerned. (P. 55 Transcript of Oral Argument).

reason of exclusive agreements which, in any event, had not been in effect for years prior to the entry of the decrees of injunction.

With respect to National's first contention, exclusive agreements are not per se violation of the anti-trust laws and are permitted in circumstances where the facts disclose a course of conduct and reasonableness of action not prohibited by the anti-trust laws. See United States v. Bausch & Lomb Optical Co., 45 F. Supp. 387 (S.D.N.Y. 1942), affirmed, 321 U.S. 707 (1944); United States v. Columbia Steel Co., 334 U.S. 495, 522-523 (1948); United States v. Imperial Chemical Industries, Ltd., 105 F. Supp. 215, 244-245 (S.D.N.Y. 1952). In our opinion Judge Kirkpatrick and Judge McGranery erred in premising their decisions upon the per se invalidity of exclusive agreements.

National next urges that the existence of disputed issues of fact here precluded the granting of summary judgment. It is well-settled that summary judgment may be granted only if the pleadings, depositions, admissions and affidavits ". . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see F.A.R. Liquidating Corp. v. Brownell, 209 F. 2d 375 (3rd Cir. 1954). Any doubt as to the existence of a genuine issue of fact is to be resolved against the moving party. Sarnoff v. Ciaglia, 165 F. 2d 167, 168 (3rd Cir. 1947). Further, documents filed in support of a motion for summary judgment are to be used for determining whether issues of fact exist and not to decide the fact issues themselves. Frederick Hart & Co. v. Recordgraph Corp., 169 F. 2d 580 (3rd Cir. 1948).

So viewing our function, we must determine whether there is any material fact, bearing on the proof of a monopoly genuinely in issue.

The power to control prices or exclude competition is the essential element of monopoly. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911). The actual raising of prices or exclusion of competition is not a requirement to meet this essential element. American Tobacco Co. v. United States, 328 U.S. 781 (1946). Promotion of competition in open markets, the overall purpose of the anti-trust law, requires measurement of the power in terms of an "area of effective competition" in order to determine its illegality. Standard Oil Co. of California v. United States, 337 U.S. 293, 299 n. 5 (1949); see United States v. duPont & Co., 351 U.S. 377 (1956). With respect to the effectiveness of a defendant's power in a particular market, United States v. duPont & Co., 118 F. Supp. 41 (1953), affirmed 351 U.S. 377 (1956), is illuminating. There the District Court said at page 197:

> "'*Market control' or lack of 'market control' are ultimate facts. They are determined by fact-finding processes*, and on the basis of knowledge and analysis of all competitive factors which bear on a seller's power to raise prices, or to exclude competition. *Existence of monopoly powers is not made on the basis of assumption as to competitive markets.* If the price, quantity of production and sale, and the quality of a seller's product are determined by pressures exerted on him by buyers and sellers of another's product, the products and the sellers must, for purposes of any realistic analysis, be in the same 'market' and must be in competition with each other." (Emphasis supplied.)

Definition of the "market" requires a consideration of substitutes, the significance of which was explained in Times-Picayune Publishing Company v. United States, 345 U.S. 594, 612 n. 31 (1953), as follows:

> "For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose 'cross-elasticities of demand' are small."

Having established a defendant's dominance in a relevant market, the "monopoly in the concrete", early discussed in Standard Oil Co. of New Jersey v. United States, supra at page 62, the Sherman Act Section 2 prohibition further requires a monopoly consciousness, an attainment of dominance by anti-competitive activities. Alone, a dominant market position and the monopolistic attributes of such a position does not entail illegality. Mr. Justice Frankfurter, concurring in United States v. duPont & Co., supra at page 413, said:

> "The boundary between the course of events by which a business may reach a powerful position in an industry without offending the outlawry of 'monopolizing' under § 2 of the Sherman Act and the course of events which brings the attainment of that result within the condemnation of that section, cannot be established by general phrases. *It must be determined with reference to specific facts upon considerations analogous to those by which § 1 of the Sherman Act is applied.*" (emphasis supplied)

These "considerations" were succinctly stated by Mr. Justice Brandeis in Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 238 (1918):

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. *To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable.* The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." (emphasis supplied)

If National's dominant position was the result of natural business growth, of development consistent with the intent of the anti-trust laws, it cannot now be condemned. "The successful competitor, having been urged to compete, must not be turned upon when he wins." United States v. Aluminum Co. of America, 148 F. 2d 416, 430 (2d Cir. 1945); see United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 341-342 (D. Mass. 1953), aff'd per curiam 347 U.S. 521 (1954).

National, say the plaintiffs, as a result of its exclusive dealing with the producer-distributor-defendants, has, with reference to standard accessories containing copyrighted materials supplied by the producer-distributor-defendants,

the power to raise prices or exclude any and all competition within the market area of those particular accessories. However, National contends that its effectiveness in the market is limited by other forms of advertising such as newspapers, magazines, radio, television, mail and handbills; and further, that the standard accessories which it manufactures and leases are not essential to the exhibitor since equally effective articles are available to the exhibitor from other sources such as sign-painters, printers, and other poster-renters.[10]

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[10] In the Affidavit (No. 1) of Herman Robbins, Chairman of the Board of Directors of National, filed February 14, 1951, in the Lawlor suit, the following statements are made (p. 12b, Appendix for National Screen Service Corporation):

"Many of National Screen's products have incorporated in them copyrighted material. This material is reproduced by National Screen under a license from the copyright owner for which it pays substantial consideration. To the extent that such copyrighted material cannot be copied by competitors without authority from the copyright proprietor, there is a limitation upon its reproduction. But it is not essential for the exhibtor to have copyrighted trailers or accessories. Many of the largest theatres in the United States do not use them, but use instead trailers or accessories containing no copyrighted material. There are many available sources for such competitive products."

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P. 14b: "Furthermore, it is not essential that copyrighted standard accessories be used. There are available unlimited sources of supply of non-copyrighted accessories. Such accessories are produced and widely used. For example, window cards are printed by any printer. Mats are supplied by various independent companies fully equipped and ready to serve. Non-copyrighted accessories of other kinds can be and are manufactured by various sign and print shops and lithographing plants. There are many hundreds of these throughout the United States. Any exhibitor who chose to, could avail himself of these competitive sources, and this is done."

Whether the standard accessories produced and distributed by National are in the same "area of effective competition" as other media of movie advertising, and whether there are equally effective substitutes for the accessories produced and distributed by National are factual issues, not capable of resolution on pleadings and affidavits. Such issues require determination by the trier of facts only after trial.

National contends that the legality of its dominant position is determinable only after a finding and analysis of the facts peculiar to the business involved. On this score National points out, inter alia, that the exclusive agreements between National and the distributor-defendants were motivated by "legitimate business reasons",[11] that competition has not been restricted, and that plaintiffs have complete access to the standard accessories produced by National. Generally, says National, it has in its pleadings and affidavits shown its development to be consistent with the intent of the anti-trust laws.[12]

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[11] As was noted above, Judge McGranery in his opinion, 99 F. Supp. 180 at page 187, said: "The affidavits submitted by the defendants clearly indicate that each producer-distributor entered into its agreement with National Screen independently, for legitimate business reasons related to its own enterprise. . ."

[12] In the affidavit of Herman Robbins, supra Note 10, the following "history" of National's growth and competitive effectiveness is advanced:

Originally the movie producers leased copyrighted standard accessories directly to exhibitors. Seeing business advantages in the area of poster distribution, "poster-renters" acquired the copyrighted accessories by illegal methods such as bribery and theft. Measures were taken by producers to eliminate the illegitimate supply which were effective enough to require a group of poster-renters to hire a manufacturer to create infringing material. Relief against

Plaintiffs charge National with these anti-competitive acts: increasing of prices to plaintiffs forcing them to lease material at a loss in order to compete with prices charged the exhibitors by National; refusing to make available to plaintiffs standard accessories which National had in its local exchange where plaintiffs' customers were forced to go; reducing rental prices to exhibitors including plaintiffs' customers if they agreed to buy all advertising material from National; using tie-in sales requiring exhibitors to buy standard accessories from it if they also wanted the specialty accessories and trailers.

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the infringement was granted by the courts, but the illegal practices continued.

Against this background, Paramount (and later other producers) sought a reputable agency to manufacture and distribute its copyrighted standard accessories. In view of National's reputation in the production and distribution of trailers and specialty accessories, it was approached for negotiation with respect to the rights relating to Paramount's standard accessories. Paramount and National successfully negotiated a contract which emphasized quality and effectiveness of the accessories, low cost to exhibitors, and wide and prompt distribution to theatres throughout the United States.

During the Second World War the shortage of manpower became acute. Due to problems of manufacture and service, several producers solicited National to take over the manufacture, leasing and shipment of their accessories. National was also suffering from limited manpower and loss of experienced help and was therefore reluctant to take on additional responsibilities, and on a number of occasions declined these proposals. However, over an extended period contracts were made with the major producers, some in 1940 and 1942, and some in 1944, 1946 and 1947. Important in the decision of many of the producers to give up their control of the accessories to National was the fact that continuous losses had been sustained by them in this activity.

In accordance with the desires of the producers National has produced high quality accessories and has kept costs below all comparable standards.

All of these alleged acts are denied by National.

Trial of the disputed factual issues is required to arrive at the ultimate fact-finding as to whether the exclusive agreements between National and the producer-distributor-defendants formed part of a deliberately acquired monopoly, or whether they were part of the natural business growth of National, reasonably necessary to protect the

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As to distribution, the facilities of National were found to be inadequate by Paramount. Because it desired to encourage easy accessibility to its advertising accessories, Paramount wished to have a representative number of strategically located offices throughout the country. National added more than twenty new offices to its organization requiring leasehold obligations in excess of five years for each of the acquired branches. The large outlay by National prompted the five-year exclusive clause. No other company existed that could make this large and expensive undertaking, and apparently there has been none since.

In the case of standard accessories, there is unlimited competition, including even the copyrighted material. National has offered to all poster-renters the right to acquire at wholesale rates its copyrighted standard accessories for lease to exhibitors. They have competed in the same area on equal terms with National without sharing the burden of large investments and risk in manufacture of accessories. The factor of obsolescence alone results in losses to National of hundreds of thousands of dollars each year. Poster-renters avoid this factor since they order from National what they need at a particular time. How effective the other poster-renters are is illustrated by the fact that plaintiffs Lawlor and Pantzer's business with National increased approximately tenfold in the six-year period preceding the institution of the action. These plaintiffs on deposition further testified that every consumer that they had was at one time a customer of National.

Finally, National's present position in the industry is singularly appropriate. No other poster-renter desires to enter the business of manufacturing the standard accessories. National is the only nation-wide organization with the desire and facilities to do so.

lawful business interests of National and the producer-distributor-defendants.

In view of the above it is unnecessary for us to resolve National's contention that the injunctive relief granted was inappropriate in these cases. The District Court will, of course, give consideration to the elements required by Section 16 of the Clayton Act as a basis for any injunctive relief that may be required as disclosed on a trial of the issues.

For the reasons stated the summary judgments and injunctive decrees entered by the District Court will be reversed and the causes remanded with directions to proceed in accordance with this opinion.

Since the plaintiffs have withdrawn their appeals 11,818 to 11,824 inclusive, they will be dismissed.

Judge Hastie concurs in the result.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Office - Supreme Court, U.S.
FILED
JAN 13 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

No. 632

CHARLES LAWLOR and MITCHELL PANTZER, co-partners, trading as INDEPENDENT POSTER EXCHANGE,

Petitioners,

vs.

NATIONAL SCREEN SERVICE CORPORATION,

Respondent.

RESPONDENT NATIONAL SCREEN'S BRIEF IN OPPOSITION

LOUIS NIZER,
WALTER S. BECK,
Attorneys for Respondent, National Screen Service Corporation.

SUPREME PRINTING CO., INC., 114 WORTH STREET, N. Y. 13. BEEKMAN 3-2320
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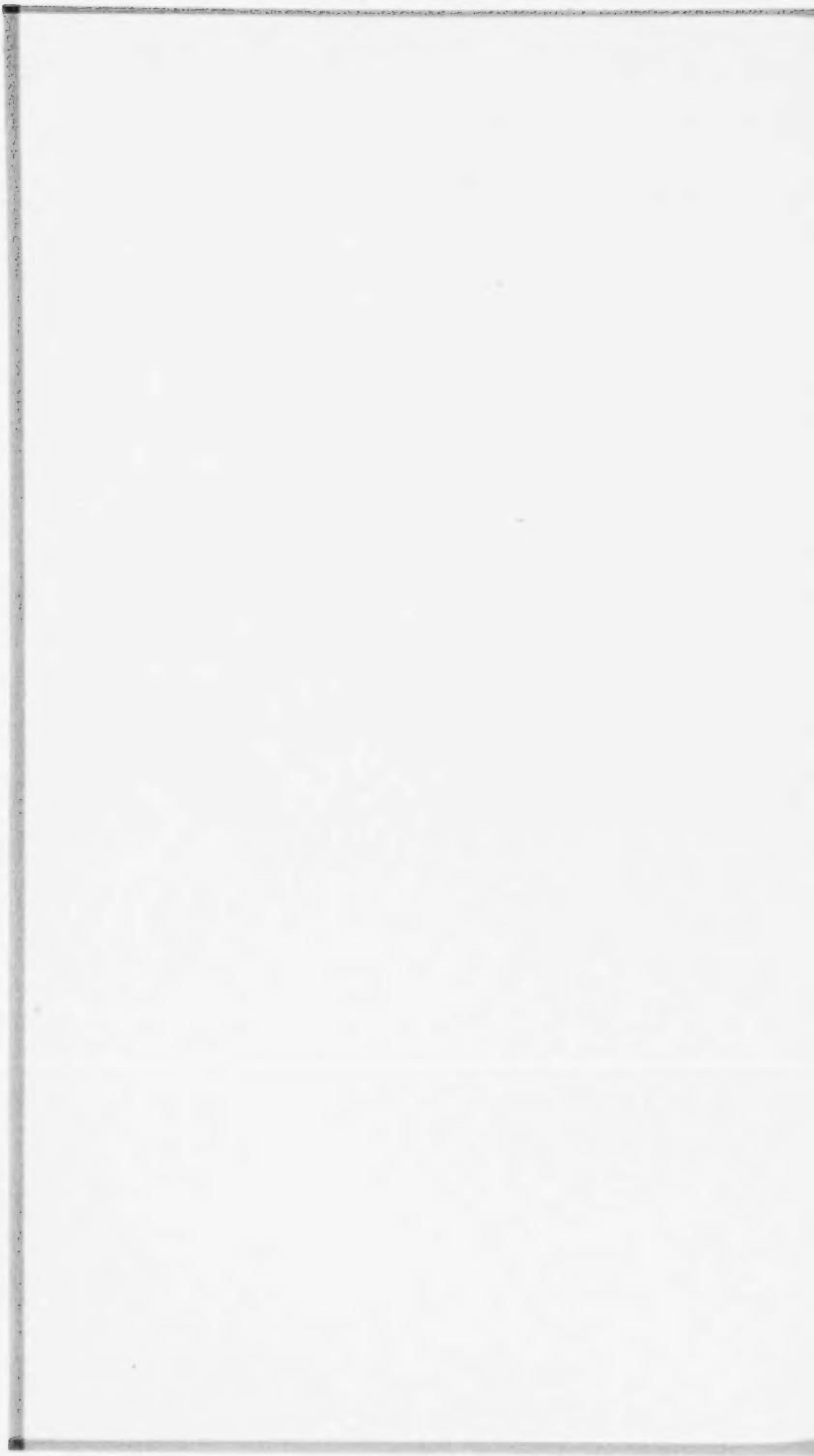

IN THE

Supreme Court of the United States

No. 632

—o—

CHARLES LAWLOR and MITCHELL PANTZER, co-partners, trading as INDEPENDENT POSTER EXCHANGE,

Petitioners,

VS.

NATIONAL SCREEN SERVICE CORPORATION,

Respondent.

—o—

RESPONDENT NATIONAL SCREEN'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals has not been reported. A copy thereof is appended to Petitioners' "Petition" (See Appendix A, annexed to the Petition, p. 1A).

The opinion of the District Court, dated August 8, 1955 is also unreported. A copy of it is contained in the "Appendix for Plaintiffs-Appellants" * at pages 29a-31a.

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* Three volumes of printed appendices were filed in the court below, i.e. (1) "Appendix For Plaintiffs-Appellants", consisting of pages 1a to 229a; (2) "Supplemental Appendix For Plaintiffs-Appellants", consisting of pages 230a to 240a, and (3) "Appendix For National Screen Service Corporation", consisting of pages 1b to 32b. A certified copy of these appendices, and nine additional copies thereof, have been filed by Petitioners.

A certified copy of a "Supplemental Appendix for National Screen Service Corporation" consisting of pages 33b to 36b was also filed by Petitioner but the required nine copies thereof are hereby filed by Respondent National Screen Service Corporation.

All references herein to the appendices filed by Petitioners in the court below will be designated "a", and to Respondent's appendices below by "b". References to Petitioners' appendix in this Court will be designated by the capital letter "A".

The opinion of the District Court dated July 25, 1951, which was followed in the above mentioned opinion of August 8, 1955, is reported in 99 F. Supp. 180. A copy of it is contained also in the "Appendix For Plaintiffs-Appellants" at pages 16a-28a.

A copy of the final decree entered by the District Court is contained in the "Appendix For Plaintiffs-Appellants" at pages 35a-36a.

JURISDICTION

Petitioners are purporting to invoke the jurisdiction of this Court under the Act of June 25, 1948, c. 646(1), 62 Stat. 928(1) 28 U. S. C. Sec. 1254(1). However, in view of the fact that the judgment sought to be reviewed is merely interlocutory, and the instant action is a private treble-damage anti-trust suit involving no issues of importance to the public, or principles as to which there is any conflict between Circuit Courts of Appeal requiring resolution by this Honorable Court, jurisdiction should not be entertained and the petition should be dismissed.

STATUTES INVOLVED

This case is a private anti-trust suit for treble damages and injunctive relief premised on alleged violation of Sections 1 and 2 of the Sherman Anti-Trust Act, 26 Stat. 209; 50 Stat. 693, 15 U. S. C. A. Sections 1 and 2; Sections 4 and 16 of the Clayton Anti-Trust Act, 38 Stat. 731, 737, 15 U. S. C. A. Sections 15 and 26. (See Opinion of C. C. A. 3 Cir., Appendix A annexed to "Petition" herein, p. 2A, note 2.) Accordingly, Petitioners' statement (*id.* p. 4) does not fully list the "Statutes" Involved.

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly decided that the instant private treble-damages anti-trust action could *not* be determined on a motion for summary judgment since there are present numerous disputed issues as to material

facts—"not capable of resolution on pleadings and affidavits" which "require determination by the trier of facts only after trial"?

2. Whether the Court of Appeals correctly held that the mere circumstance that respondent National Screen had previously held exclusive licenses from the defendant motion-picture producers to manufacture and distribute advertising accessories for the producers' copyrighted motion pictures did *not per se* constitute National Screen an unlawful monopoly, nor justify the granting of summary judgment and the granting of a sweeping permanent injunction—since exclusive contracts are not *illegal per se,* and a trial was necessary to determine the numerous disputed issues of fact presented herein—which included among others, the following:

(a) Whether, in fact, National Screen monopolized or ever had the power to monopolize the motion picture advertising accessory business, which National Screen's affidavits deny?

(b) Whether, in fact, as respondent's affidavits demonstrate, there were and are available in the market, similar or equivalent competitive materials?

(c) Whether, in fact, as respondent's affidavits demonstrate, legitimate business reasons necessitated the granting of such exclusive licenses to National Screen, thereby disproving petitioners' claim of illegal motivation and invalidity?

(d) Whether, as respondent's affidavits deny, petitioners ever suffered any injury or are faced with any threat of injury in their business as an alleged result of such exclusive contracts—concededly extinct long prior to the granting of summary judgment and the sweeping injunction?

(e) Whether, in fact, any contraction in the supply of such advertising accessories, either to petitioners

or otherwise, resulted from said exclusive arrangements—a circumstance denied by respondent's affidavits?

(f) Whether, as respondent's affidavits demonstrate, petitioners' competitive position was never prejudiced and could not have been adversely affected by such exclusive licenses, particularly since petitioners have at all times conceded that they do not want to manufacture and distribute such accessories, and expressly rejected in court the offer to place them "* * * in exactly the same position as National Screen is to-day in every particular"?

(g) Whether, in fact—as respondent's affidavits claim—respondent has not engaged in any unfair competitive practices made possible by respondent's exclusive licenses?

3. May a permanent injunction be directed without any proof of threatened injury and in the face of petitioners' express admission in open court that " 'it is substantially correct' that they are not 'being damaged in any way' as far as National's conduct at the present time is concerned"; and where it is indisputable that the exclusive licenses had not been in effect for years prior to the granting of the injunction and the question as to their validity had become moot?

4. Should the petition herein be dismissed and the writ denied—since the judgment sought to be reviewed merely rejects summary judgment as a means of determining numerous ultimate disputed facts and directs a trial of such disputed issues—none of which are of any importance to the public as distinguished from the parties themselves, and no conflict of opinion exists between the Courts of Appeal concerning their legal significance or effect?

STATEMENT OF THE CASE

This is a private treble-damage anti-trust suit in which the petitioners-plaintiffs, who are merely dealers or "jobbers" in leasing to exhibitors, standard advertising accessories for motion pictures, such as posters and stills, are seeking treble damages, and an injunction to restrain the continuance of respondent's exclusive *licenses* * from the defendant motion picture producers to manufacture and distribute such advertising accessories—generally referred to as "standard accessories" (194a). "Standard Accessories" consist principally of lithographed posters, and photographs (stills) of scenes from copyrighted motion pictures, and other similar articles designed for display in and about theatre lobbies to stimulate public attendance at a current or future exhibition of a picture.

Prior to 1940 each motion picture producer manufactured and distributed its own standard accessories through its branch offices throughout the country (5b). Thereafter, at various and widely separated intervals, in the years between 1940 and 1947, National Screen was granted exclusive licenses by the respective defendant motion picture producers, to manufacture and distribute such standard accessories.

In April 1942, petitioners and other poster-renters brought a treble-damage action against respondent National Screen and three producer defendants (RKO, PARAMOUNT and LOEW'S) charging that the exclusive licenses from those three producers constituted a violation of the Anti-Trust laws.

That suit was settled by a dismissal with prejudice and National Screen's granting to Petitioners herein and others

* Though in effect at the inception of the action, they were not in existence for many years prior to entry of the order granting summary judgment.

of sub-licenses (110a, 124a, 125a, 126a, 127a, 128a, 129a), whereby National Screen agreed to supply Petitioners and the other sub-licensees with all of their respective requirements of standard accessories which National Screen was then exclusively licensed to manufacture and distribute and might subsequently manufacture under exclusive licenses subsequently acquired from other motion picture producers.

In 1946, the sublicenses were renewed by the parties for an additional five years (App. to Petition 4A); and though no new sublicenses have been signed, National Screen has "continued and still continues to make supplies (of standard accessories) available to plaintiffs" (id. 6A).

On August 18, 1949, the present action was instituted against respondent National Screen and the various motion picture producers. As in 1942, in all of these actions, the plaintiffs' claim of Sherman Act violations, was based upon the same exclusive licenses from the producers to National Screen to manufacture and distribute nationally "standard accessories", which respondent was obliged to make available to the respective plaintiffs, including petitioners, under the sublicense agreements with respondent.

In July 1951, plaintiffs moved before Judge McGranery for summary judgment with respect to the injunctive relief requested, which the Court granted (solely against National Screen, but denying it against all of the other defendants), with an opinion (99 F. Supp. 180, 185, 187) which, as the Court of Appeals points out, clearly reveals that his determination was premised upon a legal assumption "that National's exclusive contracts with the producer-distributors were, *per se*, as a matter of law, an illegal monopoly under the Sherman Anti-Trust Act" (See C.C.A. opinion, App. to Petition 6A-7A). The Court of Appeals noted that Judge McGranery's view was unaffected by the fact, which he deemed "entirely irrelevant, that there may have been no resort to unfair competitive practices"

and that "he had found no evidence of any conspiracy between National Screen and the producer-distributors in the negotiation of the exclusive contracts" (id. 7A*).

Petitioners having failed to enter a decree in 1951 when invited to do so—which would have allowed this respondent to appeal at that time—renewed their motion four years later before Chief Judge Kirkpatrick, in 1955, instead of proceeding to trial.** Chief Judge Kirkpatrick, unpersuaded that Judge McGranery's view was erroneous, followed it (29a).

The Court of Appeals however ruled that: *"In our opinion Judge Kirkpatrick and Judge McGranery erred in premising their decisions upon the per se invalidity of exclusive agreements"*. (See C. C. A. Opinion, App. to Petition, 11A.)

The Court of Appeals rested its view not only upon the general applicable law, but also pointed to the facts that Petitioners' own counsel admitted at the hearing on the settlement of the decree (September 14, 1955), "that the exclusive contracts did not, as a matter of law, *per se* constitute a violation of the Sherman Anti-Trust Act, going so far as to state 'Exclusivity has nothing to do with it'". (id. 9A); and that at the same hearing, petitioners *rejected* the offer "to put the plaintiffs (petitioners herein) * * * in exactly the same position as National Screen is today in every particular" (id. 8A). The Court of Appeals also pointed to Petitioners' further admission made at the oral

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* The Court of Appeals repeatedly points to Judge McGranery's own observation—at p. 187 of his own opinion—that:

> "The affidavits submitted by the defendants clearly indicate that each producer-distributor entered into its agreement with National Screen independently for legitimate business reasons related to its own enterprise * * *" (See CCA Opinion, App. to Petition 6A and 16A.)

** Accordingly, the delay in bringing this action to trial, which Petitioners complain of, is directly attributable to Petitioners' preference for a procedural short-cut and unwillingness to have the evidence fully revealed and tested by a searching Trial Court.

argument, that " 'it is substantially correct' that they are not 'being damaged in any way' as far as National's conduct at the present time is concerned" (id. 10A).

In this connection, Chief Judge Kirkpatrick's "Opinion" expressly points out that Petitioners do not even attempt to contradict National Screen's contention that since 1951 (when Judge McGranery's decision was first published) National Screen had eliminated all objectionable features of its agreements with the producer-distributors, "*especially the exclusive character of the licenses granted*". Pet's' App. in C. C. A., 29a). In their brief in the Court of Appeals, Petitioners in effect conceded that for several years prior to the decision by Chief Judge Kirkpatrick, there had *not* been any *exclusive* license agreements (Pets' brief in C. C. A., pp. 10, 14).

Chief Judge Kirkpatrick was not unmindful of the legal effect of the elimination of the *exclusive* license provisions, but did not feel "*called upon to decide whether, if these actions had been commenced after these changes in the contracts were made, the plaintiffs would be entitled to a judgment against National Screen*"; (Pets' App. in C. C. A., 29a). He felt compelled to deal "*with the situation existing when these actions were commenced* * * *" (id. 30a). This Honorable Court has held to the contrary. *Standard Oil* v. *U. S.* (283 U. S. 163, 181-2); *U. S.* v. *Borden* (347 U. S. 514, 518, 519-20); *U. S.* v. *W. T. Grant Co.* (345 U. S. 629, 633). It is therefore clear that it was Chief Judge Kirkpatrick's erroneous view as to the applicable law, that prompted him to determine the issue as of the commencement of the action.

However, in view of its conclusion that there are present herein numerous disputed issues of fact "not capable of resolution on pleadings and affidavits", but which "require determination by the trier of facts *only after trial*," * (16A), the Court of Appeals deemed it "unnecessary * * * to re-

* Italics ours.

solve National's contention that the injunctive relief granted was inappropriate * * *" (id. 19A).

Summarizing the disputed ultimate facts which the Court of Appeals expressly referred to as requiring resolution by a trial:

> Whether or not National Screen actually possesses monopoly power—an ultimate fact depending on many factors such as the power to control prices or exclude competition in the competitive market area (12A), which neces arily involves the factual determination of what constitutes the competitive market area, and does such market area include the other media of motion picture advertising (such as newspapers, magazines, radio, television, mail, handbills and others), and are those other media reasonably effective substitutes for the accessories manufactured and distributed by National Screen (16A)?
>
> Whether National Screen enjoys "a dominant market position" (13A), and if so, whether it reached that position by valid or illegal means as interpreted under the Sherman Act (14A), which determination necessarily includes consideration of whether the *exclusive* licenses (now extinct) from the motion picture producers, were motivated by legitimate business reasons and for the reasonable protection of the business interests of National Screen and its licensors (16A) or formed part of a deliberate plan to effect a monopoly (18A)?
>
> Whether National Screen's role merely effects a regulating influence upon the business and thereby promotes competition, or unreasonably restrains it (14A)—a test which this Honorable Court applied in *Board of Trade of the City of Chicago* v. *U. S.* (246 U. S. 231, 238)?
>
> Whether Petitioners' charges of National Screen's alleged anti-competitive acts (17A)—which National Screen's affidavits deny (18A)—are true or utterly groundless?

As to all of these disputed factual issues—and many others present herein to which, we believe, the Court of Appeals did not find necessary to advert to, since their recital would merely have a cumulative effect for reversal herein—that learned Court held that they were "*not capable of resolution on pleadings and affidavits*"—*but "require(d) determination by the trier of facts only after trial"* (16A).

ARGUMENT

Fully cognizant that the Court of Appeals *correctly* ruled that the presence of disputed issues as to material facts "*precluded the entry of summary judgments*" (App. A annexed to Petition p. 1A); Fed. R. Civ. P. 56(c); *Sartor* v. *Arkansas Natural Gas Corp.* (321 U. S. 620, 623, 624, 627, 628); *F. A. R. Liquidating Corp.* v. *Brownell* (209 F. (2d) 375, 3rd Cir. 1954); *Sarnoff* v. *Ciaglia* (165 F. (2d) 167, 168, 3rd Cir. 1947), and that the inquiry as to whether an agreement or arrangement effects a *monopoly* in one of the parties, necessarily involves a determination by "fact-finding processes",* of ultimate *facts* premised upon a careful analysis and interpretation of subordinate facts peculiar to the business in which the alleged monopoly is claimed—which could not be made on pleadings and affidavits but "require(s) determination by the trier of facts only after trial" (16A), *Board of Trade of the City of Chicago* v. *U. S.* (246 U. S. 231, 238); *F. C. C.* v. *R. C. A. Communications, Inc.* (346 U. S. 86, 92); *U. S.* v. *Du Pont* (118 F. Supp. 41, 196, 197; aff'd 351 U. S. 377; also see concurring opinion of Mr. Justice Frankfurter at page 413); *Transamerica* v. *Board of Governors* (206 F. (2d) 163, cert. den. 346 U. S. 901);—Petitioners herein now contend that it was unnecessary to determine any of these ultimate facts because National Screen once held exclusive

* *U. S.* v. *DuPont & Co.* (118 F. Supp. 41, aff. 351 U. S. 377—at p. 197 Dist. Ct. Opinion.

licenses from the defendant motion picture producers to manufacture and distribute "standard accessories"—which concededly, expired many years prior to the granting of summary judgment by the District Court.

Petitioners argue that the original exclusive licenses constituted National Screen an unlawful monopolist—*as a matter of law*—which justified the granting of summary judgment purporting to adjudge National Screen an unlawful monopolist deserving of a permanent injunction (Petition p. 24). In this connection, Petitioners now argue:

> "Petitioners rely entirely on documentary evidence, * * * i.e., the exclusive license agreements and the sublicense agreements. *The one and only question* * is whether the system set up by those agreements is legal or illegal (Pet. p. 24).
>
> • • •
>
> " * * * in the opinion of the court below reference is made to the fact that in their complaint petitioners charge respondent with commission of various specific acts of unfair competitive practices, and in support of its denial of injunctive relief the Court points out that respondent denies these charges. But * * * petitioners do not rely on establishment of any of these charges insofar as their prayer for injunctive relief is concerned. In that connection, petitioners rely on the rule of law that they are entitled to injunctive relief against threatened injury to their business, regardless of the fact that no actual injury has been suffered" (Pet. pp. 26-27).

Petitioners prefer to forget (*as the Court of Appeals points out in its "Opinion"*) that at the hearing on the settlement of the Decree entered in the District Court, Petitioners' counsel admitted that "Exclusivity has nothing to

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* Italics ours.

do with it",* and further conceded "that the exclusive contracts did *not*, as a matter of law, per se constitute a violation of the Sherman Anti-Trust Act" (C. C. A. opinion, 9A).

That these admissions did not stem from mere misapprehension of the applicable law, but were deliberate conclusions based on Petitioners' unwillingness to take on the financial responsibilities of manufacturing and distributing—as National Screen is required to under its current non-exclusive arrangements with the defendant-producers—was dramatically demonstrated at the hearing on the settlement of the decree in the District Court when Petitioners were offered the opportunity to be placed " * * * 'in exactly the same position as National Screen is to-day in every particular', but the offer was rejected" (See C. C. A. opinion, 8A annexed to Petition).

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* In Footnote 7 to its "Opinion", the Court of Appeals quotes the following excerpts from the transcript of the hearing on the settlement of the decree before Chief Judge Kirkpatrick, held on September 14, 1955:

> P. 62: "Mr. Anderson: Now, that whole clause (as to exclusivity) your Honor—and I don't want to exaggerate it—I should say it is nothing more than a flourish. It has no real significance in the case at all * * *"
>
> * * *
>
> P. 63: "The exclusion provision has no bearing at all on the workings of this team, (National and the film companies) which is to sew up the source of supply of posters, which is absolutely independent of * * *."
>
> * * *
>
> P. 78: "The Court: First of all, tell us what you have to say about what Mr. Beck pointed out as an apparent inconsistency, an inconsistent stress on exclusivity at the time of the McGranery hearings.
>
> "Mr. Anderson: I have no doubt it is true. I have learned a lot since then, Judge. They tell me Abe Lincoln argued one thing one morning and another in the afternoon. It seems to me that that is just an attack on Anderson. Even now I don't think I am as good as they are.
>
> "The Court: Well, you seemed anxious to answer it.
>
> "Mr. Anderson: I just wanted to say that. Why drag in questions that aren't pertinent? It isn't a question of whether what I said in 1951 was correct or not or whether it was stupid or anything like that. The question is whether what I am saying now is right."

Petitioners repeat their rejection of complete equality with National Screen of opportunities as well as burdens—in their Petition in this Court:

> "And there is nothing on this record to show that petitioners could make such investments *even if they had any desire to emulate National Screen, which they do not*" (italics ours) (Pet. p. 26).

But neither the Court of Appeals, nor respondent herein, relies solely upon Petitioners' counsels' admissions. The fact is—as the Court of Appeals held—that it is settled law, that exclusive agreements are *not per se* violations of the anti-trust laws. Under certain circumstances and conditions they are lawful and proper. *U. S.* v. *Bausch & Lomb Optical Co.* (45 F. Supp. 387, aff'd 321 U. S. 707); *U. S.* v. *Columbia Steel Co.* (334 U. S. 495, 523); *U. S.* v. *Imperial Chemical Industries, Ltd.* (105 F. Supp. 215, 244-5); *Pick Mfg. Co.* v. *General Motors* (80 F. (2d) 641, aff'd 299 U. S. 3); *Brosius* v. *Pepsi-Cola* (155 F. (2d) 99); *Locker* v. *American Tobacco Co.* (218 F. 447, 450).

International Salt Co. v. *U. S.* (332 U. S. 392) cited by Petitioners at page 23 of their Petition herein, is without the slightest application for there "*Neither party submitted affidavits*" (p. 394) and hence there were no disputed factual issues. The only question was one of law, *i.e.* the legality of a provision in a leasing agreement for the use of a patented salt dispensing machine, which "require(d) the lessees to purchase from appellant (the lessor) all unpatented salt and salt tablets consumed in the leased machines" (p. 394). This Honorable Court condemned this "tying clause" as an illegal attempt to extend the lessor's patent to unpatented articles (*id.* p. 396).

As to the method of determining the reasonableness or invalidity of the exclusive licenses—the Court of Appeals correctly held:

> "Trial of the disputed factual issues is required to arrive at the ultimate fact-finding as to whether the exclusive agreements between National and the producer-distributor-defendants formed part of a deliberately acquired monopoly, or whether they were part of the natural business growth of National, reasonably necessary to protect the lawful business interests of National and the producer-distributor-defendants" (App. to Pet. 18A).

Earlier in its "Opinion", the Court of Appeals recalled that Judge McGranery's "Opinion" noted that: "The affidavits submitted by the defendants clearly indicate that each producer-distributor entered into its agreement with National Screen independently, for legitimate business reasons related to its own enterprise * * * " (*id.* p. 16A).

Therefore, presumptively, and certainly until proven untrue by contrary evidence on a trial, the exclusive licenses were valid and lawful, and Petitioners' assertion that they should be deemed illegal *per se* and violative of the Sherman Act *as a matter of law*—violates not only settled legal principles but common sense as well.

Petitioners admission that they are not "being damaged in any way", and the absence of any proof of even a threat of injury compelled the vacatur of the permanent injunction herein.

Though unessential to the determination of petitioners' application herein, we nevertheless deem it highly significant that the record is bare of any evidence upon which a permanent injunction could be premised. We shall, therefore briefly discuss the cardinal facts which demonstrate the basic error of the District Court, and the correctness of the Court of Appeals' vacatur.

In his "Opinion", Chief Judge Kirkpatrick made particular reference to the fact that petitioners had not even attempted to contradict respondent's demonstration that

respondent had eliminated "all the features of its agreements with the producer-distributors which the Court found objectionable, *especially the exclusive character of the licenses granted*" (see Opinion 29a, emphasis ours). Even petitioners' briefs in the court below, in effect conceded this to be the fact (petitioners' brief below, pp. 10, 14). At the oral argument in the court below, petitioners admitted "that 'it is substantially correct' that they are not 'being damaged in any way' * * *" (Note 9, C. C. A. Opinion, 10A).

Both Judge McGranery and Chief Judge Kirkpatrick took note of petitioners' repeated admissions that they never wanted to engage in the business of manufacturing and distributing standard accessories (19a, 31a); and even on the settlement of the decree, rejected the Court's proffer to place them "in exactly the same position as National Screen is today in every particular" (8A). It is therefore self-evident that the exclusive agreements did not exclude or prevent petitioners from manufacturing and distributing such standard accessories—a business which they never desired to engage in. Therefore, any claim of injury from respondent's exclusive arrangements is pure sham, for none was possible. See *American Banana Co.* v. *United Fruit Co.* (166 Fed. 261, aff. 213 U. S. 347); *Triangle Conduit & Cable Co.* v. *National El. Prod. Corp.* (152 F. 2nd 398).

Even petitioners' brief in this Court, does not mention any circumstance which might constitute a threat of injury to them. Petitioners' sole contention in attempted justification of the injunction, is the alleged invalidity of respondent's concededly long-extinct exclusive licenses.

Section 16 of the Clayton Act permits of injunctive relief only upon proof of threatened injury by violation of the anti-trust laws. It further expressly provides that the criteria for the granting or withholding of injunctive relief, are the same as those applied by Courts of Equity. This

Honorable Court has held that no injunction may be granted in the absence of demonstration "that the act complained of will inflict upon them some irreparable injury." (*United Fuel Gas Co.* v. *R. R. Commission,* 278 U. S. 300, 310; *U. S.* v. *Borden,* 347 U. S. 514, 518-520).

The exclusive licenses having been extinct for many years prior to the granting of the injunction, so that at the time of the motion for summary judgment the question of their validity or their capacity to effect injury upon petitioners was moot (*Standard Oil* v. *U. S.,* 283 U. S. 163, 181-2; *Andersen* v. *Shipowners Asso.,* 31 F. 2d 539, 543); and petitioners themselves having in effect conceded on the oral argument in the court below that no present threat of injury exists—there was no basis for the injunction.

Since the basic issue involved herein is of a procedural character and of no importance to the public as distinguished from that of the parties themselves, and there is not only no conflict requiring resolution by this Court—but uniformity of authority between the various Circuit Courts of Appeal concerning the necessity for a trial when there are disputed material facts—the petition herein should be dismissed.

The law has long been settled by this Honorable Court that a Writ of Certiorari will be refused "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp.* v. *Western Well Works Inc.* (261 U. S. 387, 393). As in the case at bar, the *Layne* case (supra), was a private dispute concerning alleged infringement, in which plaintiff had recovered a judgment below which the Court of Appeals had reversed. Applying this Honorable Court's traditional standards, Mr. Chief Justice Taft, writing for a unanimous Court, dismissed its own Writ as having been "improvidently granted".

Similarly, in *Fields* v. *U. S.* (205 U. S. 292), this Honorable Court denied certiorari even though the judgment sought to be reviewed was a judgment of conviction in a criminal case, with the following observations: "However important the case may be to the applicant, the question involved is not one of gravity and general importance. There is no conflict between the decisions of state and Federal courts or between those of Federal courts of different circuits. There is nothing affecting the relations of this nation to foreign nations, and indeed no matter of general interest to the public" (p. 296).

By these standards petitioners' application must be denied—particularly in view of the fact that the judgment sought to be reviewed is concededly interlocutory—and not final.

U. S. v. *General Motors Corp.* (323 U. S. 373) and *Land* v. *Dollar et al.* (330 U. S. 731)—cited by petitioners at page "23" of their petition herein, as instances of this Honorable Court's granting certiorari to review questions at an interlocutory stage in a case, fully satisfy the critical standards enunciated in the *Layne* and *Fields* cases (*supra*). Thus, in *U. S.* v. *General Motors Corp.* in the very first sentence of the opinion, Mr. Justice Roberts points out that: "This case is one of first impression in this court. It presents a question on which the decisions of Federal courts are in conflict" (p. 374). The question presented therein involved whether private property could be taken by the U. S. Government for public use without just compensation, and the conflict between Circuit Courts of Appeal concerned the character of property taken for which compensation was required.

Similarly, in the *Land* case (supra), this Court expressly stated that the question whether an action was maintainable against the Commissioners of the U. S. Maritime Commission to restrain threatened acts performed by the Commission in its governmental capacity, or whether

such an action was in fact one against the United States Government itself, was of great public importance. This Court stressed: "The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented" (p. 734). Thus, even where the U. S. Government was a party, this Honorable Court determined the question as to whether certiorari should be granted or withheld, upon the traditional criteria stated in the *Layne* and *Fields* cases (supra).

Petitioners' self-serving and utterly groundless conclusion that it would serve a useful public purpose to grant a Writ herein, should be rejected.

CONCLUSION

The petition herein for certiorari should be denied.

Respectfully submitted,

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National Screen Service Corporation.

No. 632. LAWLOR ET AL., TRADING AS INDEPENDENT POSTER EXCHANGE, *v.* NATIONAL SCREEN SERVICE CORP. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. *Per Curiam:* We agree with the Court of Appeals that the motion for summary judgment should have been denied. However, in our view, this disposition of the case made it unnecessary for the Court of Appeals to pass on any other issue than that of the *per se* invalidity of exclusive contracts under the Sherman Act. In order that the District Court not be bound by the consideration the Court of Appeals gave to the remaining issues, and without reaching any of the same, we grant the petition for writ of certiorari, vacate the judgments, and remand the cause to the District Court for trial. MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE BURTON and MR. JUSTICE HARLAN join, has filed a dissent. *Francis T. Anderson* for petitioners. *Louis Nizer* for respondent. Reported below: 238 F. 2d 59.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BURTON and MR. JUSTICE HARLAN join, dissenting.

The District Court granted the motion of plaintiffs, the petitioners here, for summary judgment. The Court of Appeals, having found that summary judgment was not warranted, remanded the case for "[t]rial of the disputed factual issues." 238 F. 2d 59, 68. This Court also holds that the motion for summary judgment should have been denied by the District Court: it grants certiorari and vacates the judgment of the Court of Appeals, but directs the District Court to do precisely what the Court of Appeals directed that court to do. This is the legal situation unless I wholly misconceive the matter.

Since the Court's disposition of the petition for certiorari affects the proper administration of its own busi-

ness as well as the relation between this Court and Courts of Appeals, the matter deserves exposition.

The Court of Appeals thus stated what it called the critical issue before it: "Was there, in the cases involved in these appeals [there were other cases affecting other parties], a genuine issue as to a material fact which, under well-settled principles, precluded the entry of summary judgments adjudicating the defendant-appellant, National Screen Service Corporation ('National') to be an unlawful monopoly?" 238 F. 2d, at 60–61. Having found that there were triable issues of fact, it concluded that summary judgment should not have been entered and sent the case back for trial. This Court now echoes these conclusions: the motion for summary judgment should have been denied and the plaintiffs must establish their claim at trial.

The explanation of the puzzle must lie in the statement that this Court is doing what it is doing "[i]n order that the District Court not be bound by the consideration the Court of Appeals gave to the remaining issues . . . ." This is an oblique concern about the so-called "law of the case." The only "law of the case" decided by the Court of Appeals is the legal issue on which this Court agrees with the Court of Appeals. Nowhere is there a suggestion in the petition for certiorari that when the case goes back to the District Court, the trial will be restricted in determining the facts relevant to a claim under the antitrust laws. (Indeed, petitioners' only suggestion that the new trial directed by the Court of Appeals will not leave all relevant issues open for trial is that the Court of Appeals indicated that some issues "require determination by the trier of facts," while the petitioners suggest that these are issues to be determined by the trial court as a matter of law.)

One cannot read the thirteen pages of argument in support of the petition here and not be left with the conviction that the adjudication before the Court of Appeals was exclusively of the issue as the Court of Appeals stated it. That is "the law of the case," so far as that phrase has meaning, and nothing else. In the federal courts "the law of the case" is not a legal principle. It is a bogey that has been exposed, a ghost that has been laid, since Mr. Justice Holmes' opinion for the Court in *Messenger* v. *Anderson*, 225 U. S. 436, 444. The misuse of the rule of practice embodied in the conception of "law of the case," we had occasion to reject in *United States* v. *United States Smelting Refining & Mining Co.*, 339 U. S. 186, 198: "It is not applicable here because when the case was first remanded, nothing was finally decided. The whole proceeding thereafter was *in fieri*." Here the only thing that was decided was, as this Court holds, rightly decided—namely, that on the facts summary judgment is precluded and the case must go to trial.

In granting the writ of certiorari, the Court sets aside all consideration by the Court of Appeals of issues other than "that of the *per se* invalidity of exclusive contracts under the Sherman Act." It is a customary practice for a Court of Appeals, in sending a case back to a District Court for trial, to give guidance on issues that may arise in the course of the trial in order to avoid needless appeals and retrials. No doubt a District Court must follow the adjudication of a Court of Appeals on reversal and remand of a case. But here the only adjudication was that the case be tried on all the relevant issues. We review judgments not talk. The basis of the reversal was a consideration by the Court of Appeals of opinions of this Court, and more particularly of our recent decisions in *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, and *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377. What this Court has decided in those and

other antitrust cases, and not any passing observations by a Court of Appeals, are the controlling directions for the District Court.

If the opinion of the Court of Appeals in this case disregarded controlling rulings of this Court, the District Court is of course not bound to disregard such decisions of this Court. A District Court can hardly fail in its duty to its Court of Appeals in obeying what decisions of this Court command. On the other hand, if the Court of Appeals has expressed views that do not run counter to what this Court has decided, this Court should not direct the District Court to disregard them. Surely, this Court should not go out of its way to purport to pass on these questions at this stage of the proceedings, especially when the questions are abstract, and more particularly in such summary fashion. If we begin to grant petitions for certiorari although we agree with the judgment of a Court of Appeals because, perchance, in the opinion some dubious remarks may have been made that cannot as a matter of law control the trial of the cause (I am not implying that such is the case here), a new fecund source of business will still further swell the docket of this Court. Of course, if ever the contingency arises when a Court of Appeals challengingly or ignorantly disregards the controlling law as set forth by this Court, the means for correction here are ample and sure.

I would deny the petition.